IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 10, 2000 Session

GINA M. CHOROST v. DAVID I. CHOROST

Appeal from the Circuit Court for Robertson County
No. 8193 Carol Catalano, Chancellor

No. M2000-00251-COA-R3-CV - Filed June 17, 2003

This appeal involves a protracted dispute in the Circuit Court for Montgomery County arising from the dissolution of a ten-year marriage of a psychiatrist and a social worker. The proceedings have been complicated by the closing of the husband's private psychiatry practice and his inability to obtain full-time professional employment. In its final divorce decree, the trial court granted the wife the divorce and custody of the parties' children. The trial court also divided the parties' marital estate taking into consideration the husband's child support arrearage that had accumulated prior to the trial. In addition, the trial court calculated the husband's prospective child support obligation by imputing his income from full-time employment even though he had been able to work only part-time. The husband filed an untimely Tenn. R. Civ. P. 59 motion and later filed a motion to modify his child support. Following another hearing, the trial court modified the husband's child support obligation but again imputed income to the husband that he had not actually earned. On this appeal, the husband takes issue with the decision to award the wife the divorce, the division of the marital estate, the amount of his child support obligation, and the decision to order him to pay $1,000 of the wife's legal expenses. The husband's failure to file a timely Tenn. R. Civ. P. 59 motion effectively limits the scope of this appeal to two issues – the amount of his child support obligation after his motion to modify his child support and the $1,000 payment for the wife's legal expenses. With regard to these issues, we have determined that the trial court erred by imputing income to the husband that he had not earned and that the trial court erred by ordering the husband to pay $1,000 of the wife's legal expenses.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated in Part and Remanded

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM B. CAIN, J., joined.

Keith Jordan, Nashville, Tennessee, for the appellant, David Ian Chorost.

John B. Holt, Springfield, Tennessee, for the appellee, Gina M. Chorost.

OPINION

I.

David Ian Chorost and Gina Marie Pazzaglia met in the mid-1980s when they were students at Oral Roberts University in Tulsa, Oklahoma. Ms. Pazzaglia was a divorced mother of three studying social work, and Dr. Chorost was a medical student who had never been married. They married in March 1986 following a brief courtship and remained in Oklahoma for several years while completing their educations. Dr. Chorost adopted Ms. Chorost's three children, and the parties had two children of their own in 1990 and 1991. They moved to Tennessee in 1993 as "missionaries" to begin a "Christian practice" providing mental health services to low-income Tennesseans.

When he first arrived in Tennessee, Dr. Chorost affiliated with Tennessee Christian Medical Center Hospital. The hospital guaranteed him a $14,000 per month salary from July 1993 through September 1994 while he built his practice. Ms. Chorost set up his office and helped organize his practice. In addition to her administrative duties, Ms. Chorost counseled patients under Dr. Chorost's supervision to gain the experience required to be licensed as a social worker in Tennessee. Dr. Chorost's practice thrived as long as it was supported by the hospital. He earned $95,000 in 1994 and $104,000 in 1995. Eventually, Dr. Chorost hired Robin Lawson to manage his accounts receivable and to perform other administrative duties.

Dr. Chorost's financial success began to erode when the hospital stopped subsidizing his practice and the State of Tennessee implemented the TennCare program. TennCare significantly decreased the payments to psychiatrists in private practice for care provided to economically disadvantaged patients. The program's small reimbursements and strict paperwork requirements made it all but impossible for small practitioners to survive unless a majority of their patients were privately insured. Because Dr. Chorost's goal had been to provide psychiatric services to persons with low incomes, eighty to ninety percent of his patients lacked private insurance and were forced to rely on TennCare and other public assistance.

The financial pressures undermined not only Dr. Chorost's practice but also the parties' relationship. By 1996, Ms. Chorost had decided for herself that the marriage was doomed because Dr. Chorost had become too controlling in their personal and business dealings. She began surreptitiously withdrawing funds from the parties' accounts as "security." In July 1996, she obtained a $10,000 cashier's check which she placed in a safety deposit box at Robin Lawson's home for safekeeping.[1] In September 1996, Ms. Chorost withdrew another $33,478 from the parties' bank accounts, and then she and the parties' children moved into Robin Lawson's home. On September 20, 1996, Ms. Chorost filed a divorce complaint in the Circuit Court for Robertson County, alleging that Dr. Chorost had engaged in inappropriate marital conduct by harassing her and by threatening to take the children. Ms. Chorost also sought and obtained an order restraining Dr. Chorost from threatening or harassing her or from removing the children from the jurisdiction.

[1] Ms. Chorost's lawyer conceded during oral argument that Ms. Chorost took these funds in anticipation of divorce.

Dr. Chorost responded by denying that he had engaged in inappropriate marital conduct and by asserting that Ms. Chorost had engaged into two extra-marital affairs. He also conceded that the parties had irreconcilable differences and requested that they be declared divorced. He requested sole custody of his two biological children and joint custody of his two adopted children who were still minors. Finally, he requested the court to order Ms. Chorost to return the money she had taken from their bank accounts and to stop removing or destroying business and personal records.

Following the parties' separation, Dr. Chorost closed his practice, and both he and Ms. Chorost began looking for other employment. Dr. Chorost contacted a medical placement specialist and began exploring opportunities in Tennessee and elsewhere. Both parties discovered that the job search would not be easy. Finally, in February 1997, Ms. Chorost and the children moved to Enid, Oklahoma where she had been offered a job. As time went by, Dr. Chorost failed to find full-time employment in Tennessee. He also realized that pursuing employment in other states was difficult because of the licensing and credentialing requirements. Obtaining a license in another state required residing there for up to six months, and Dr. Chorost's commitments in Tennessee, including the pending divorce proceeding and a breach of contract suit against the hospital, made it difficult for him to leave Tennessee.

For the next two years or so, Dr. Chorost accepted a series of temporary positions in Tennessee while he looked for full-time employment. He worked as an independent contractor for four different agencies in Middle Tennessee, Knoxville, and Chattanooga. Following a hearing in February 1998, the trial court entered an order on April 8, 1998, setting Dr. Chorost's temporary child support at $628 per week based on the evidence that he was obligated to support three minor children and that he was earning at that time $1,920 per week. This job ended shortly after the hearing, and other than a $2,500 expert witness fee, Dr. Chorost did not find work again until October 1998, when he found another part-time position in Chattanooga paying $1,350 per week for between twenty and twenty-four hours of work.

The trial of the parties' divorce case occurred on August 12, 1998. In its order entered on October 14, 1998, reflecting its decision from the bench, the trial court granted Ms. Chorost a divorce on the ground of inappropriate marital conduct. The court awarded approximately eighty percent of the parties' marital property to Ms. Chorost, and directed Dr. Chorost to assume responsibility for all the marital debt except for the mortgage on the marital home. The court also awarded custody of the parties' three minor children to Ms. Chorost. In light of Dr. Chorost's employment status, the trial court decided that Dr. Chorost could earn $100,000 per year based on his 1994 and 1995 income tax return. Accordingly, the court directed Dr. Chorost to pay $554.18 per week in child support. The court also provided that this amount would be reduced in May 1999 to $369.46 per week when one of the minor children became eighteen.[2] The trial court also directed Ms. Chorost to provide medical insurance for the children and required the parties to be equally responsible for their uninsured medical or dental expenses.

On November 16, 1998, Dr. Chorost filed a Tenn. R. Civ. P. 59 motion requesting the trial court (1) to grant him the divorce, (2) to alter the manner in which it had divided the marital estate,

[2]With the 5% clerk's fee added to this amount, Dr. Chorost's weekly child support obligation was $581.89. In May 1999, the amount of his child support for two children became $387.93.

and (3) to recalculate the amount of his child support. On January 22, 1999, Dr. Chorost filed an amended Tenn. R. Civ. P. 59 motion as well as a motion to modify the child support set in the trial court's October 14, 1998 order. On January 28, 1999, the trial court declined to alter the allocation of fault or property division in its October 14, 1998 order but set another hearing regarding Dr. Chorost's "child support obligations both in futuro and relating back to the August 12, 1998 trial date." [emphasis in the original order]

Following another hearing in October 1999, the trial court entered an order on January 5, 2000, regarding Dr. Chorost's child support. The trial court again declined to calculate Dr. Chorost's child support based on his actual income, even though it did not conclude that he was willfully and voluntarily underemployed. The court decided that Dr. Chorost "should be able to work a twenty (20) hour work week at Eighty (80) Dollars per hour," and accordingly directed him to pay $418 per week for the two remaining minor children.[3] The trial court also awarded Ms. Chorost $24,728 in back child support as well as $1,000 to defray her legal expenses.

II.
THE SCOPE OF THIS APPEAL

As a threshold matter, we must determine whether the trial court had subject matter jurisdiction to consider all the issues Dr. Chorost seeks to raise on this appeal.[4] This question arises because of questions regarding the timeliness of Dr. Chorost's Tenn. R. Civ. P. 59 motion.

A.

The trial court filed its "Final Order For Absolute Divorce" on Wednesday, October 14, 1998. Tenn. R. Civ. P. 59.02 requires post-trial motions to be filed within thirty days of the entry of the final judgment. Therefore, Dr. Chorost's deadline for filing a Tenn. R. Civ. P. 59.04 motion fell on Friday, November 13, 1998. As far as this record shows, November 13, 1998 was not an official holiday, and the trial court clerk's office was not closed on that date.[5] Accordingly, Dr. Chorost's Tenn. R. Civ. P. 59.04 motion, filed on November 16, 1998, was untimely as a matter of fact and law.

The passage of thirty days after the entry of the trial court's final order is significant. Orders resolving all the claims between all the parties become final thirty days after they are entered, unless a party files one of the post-trial motions specified in Tenn. R. App. P. 4(a) in a timely manner. *State*

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[3] With the 5% clerk's fee added to this amount, Dr. Chorost's new weekly child support obligation was $438.90.

[4] The scope of appellate review generally extends to the issues raised by the parties. However, appellate courts may, on their own motion, consider issues not raised by the parties in order to prevent needless litigation, injury to the public's interest, and prejudice to the judicial process. Tenn. R. App. P. 13(b). One such issue is the question of subject matter jurisdiction because it is an essential ingredient for granting judicial relief both at trial and on appeal. *First Am. Trust Co. v. Franklin-Murray Dev. Co.*, 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001).

[5] If the last day of the period prescribed for doing an act falls on a Saturday, a Sunday, a legal holiday, or a day when the clerk's office is closed, the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or a day when the clerk's office is closed. Tenn. R. Civ. P. 6.01.

v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996); *Boyd v. Prime Focus, Inc.*, 83 S.W.3d 761, 766 (Tenn. Ct. App. 2001); *Waste Mgmt., Inc. of Tenn. v. South Cent. Bell Tel. Co.*, 15 S.W.3d 425, 429 (Tenn. Ct. App. 1997). A trial court loses jurisdiction over a case once its judgment has become final, and it cannot modify the judgment even if the parties agree to the trial court's action. *See State v. Peele*, 58 S.W.3d 701, 704 (Tenn. 2001); *State v. Moore*, 814 S.W.2d 381, 382-83 (Tenn. Crim. App. 1991).[6] Thus, after a trial court loses jurisdiction over a case, it does not have the authority to hear or decide a late-filed Tenn. R. Civ. P. 59.04 motion. *See* 6A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE AND PROCEDURE ¶ 59.09[1], at 59-226 through 59-227 (2d ed. 1996); 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2812, at 138-39 (2d ed. 1995).

The trial court lost jurisdiction over these proceedings on Friday, November 13, 1998, because Dr. Chorost did not file a timely Tenn. R. App. P. 59.04 motion. Therefore, the trial court did not have authority to address the issues contained in Dr. Chorost's motion. Because the court lacked jurisdiction to consider Dr. Chorost's motion, the portions of its orders filed on January 28, 1999 and January 5, 2000 addressing the issues raised in Dr. Chorost's November 16, 1998 motion are void. *State v. Peele*, 58 S.W.3d at 704; *State v. Pendergrass*, 937 S.W.2d at 837; *Brown v. Brown*, 198 Tenn. 600, 610, 281 S.W.2d 492, 497 (1955).

There is a second, related ramification of Dr. Chorost's untimely Tenn. R. Civ. P. 59.04 motion. Only timely post-trial motions will toll the time for filing a notice of appeal. *Savage v. Hildenbrandt*, No. M1999-00630-COA-R3-CV, 2001 WL 1013056, at *9 (Tenn. Ct. App. Sept. 6, 2001) (No Tenn. R. App. P. 11 application filed); *Parker v. Vanderbilt Univ.*, 767 S.W.2d 412, 414, 421 (Tenn. Ct. App. 1988); *Parker v. Vanderbilt Univ.*, No. 87-288-II, 1987 WL 26380, at *1 (Tenn. Ct. App. Dec. 9, 1987), *perm. app. denied* (Tenn. Feb. 27, 1989), *pet. reh'g denied* (Tenn. Apr. 3, 1989). Because Dr. Chorost's November 16, 1998 motion was not timely, it did not toll the time for filing a notice of appeal from the October 14, 1998 order. A timely notice of appeal is a necessary ingredient to our appellate subject matter jurisdiction to review a trial court's decision. *Arfken & Assocs., P.A. v. Simpson Bridge Co.*, 85 S.W.3d 789, 791 (Tenn. Ct. App. 2002); *Coldwell Banker-Hoffman Burke v. KRA Holdings*, 42 S.W.3d 868, 873 (Tenn. Ct. App. 2000); *Begley Lumber Co. v. Trammell*, 15 S.W.3d 455, 456 (Tenn. Ct. App. 1999).

Accordingly, the effect of Dr. Chorost's late Tenn. R. Civ. P. 59 motion is twofold. First, it prevented the trial court from considering his issues regarding the divorce, the division of the marital estate, and the calculation of his child support obligation and rendered void the portions of the trial court's January 28, 1999 and January 5, 2000 orders dealing with these issues. Second, it divested this court of jurisdiction to consider these issues because Dr. Chorost's notice of appeal from the trial court's denial of his Tenn. R. Civ. P. 59 motion was not timely. Therefore, this court cannot consider Dr. Chorost's issues regarding the divorce, the allocation of the marital estate, and the child support awards in the trial court's April 8 and October 14, 1998 orders.

[6] In civil cases, the trial court may modify a final judgment under Tenn. R. Civ. P. 60.

B.

Notwithstanding the procedural difficulties regarding Dr. Chorost's Tenn. R. Civ. P. 59 motion, his January 22, 1999 motion to modify his child support obligation does not meet the same fate. The viability of this motion does not depend upon the timeliness of his other post-trial motions because an obligor parent may file a petition to modify his or her child support obligation at any time and is entitled to relief whenever he or she demonstrates that there is a significant variance between the amount of the child support currently being paid and the amount of support required to be paid under the Child Support Guidelines. Tenn. Code Ann. § 36-5-101(a)(1) (Supp. 2002); Tenn. Comp. R. & Regs. r. 1240-2-4-.02(3) (1997).

While his Tenn. R. Civ. P. 59.04 motion was pending, Dr. Chorost filed a motion on January 22, 1999, requesting the trial court to modify the child support payments required by the October 14, 1998 decree on the ground that he was currently earning far less than the income the trial court had imputed to him in the October 14, 1998 order. Regrettably, the record does not reflect clearly that the trial court addressed this motion at the October 27, 1999 hearing. The motion was not mentioned specifically during the hearing, and the final order filed on January 5, 2000, refers only to Dr. Chorost's "Motion for New Trial." However, because of the similarity of the child support issues raised in Dr. Chorost's Tenn. R. Civ. P. 59.04 motion and his "motion to modify decree for payment of child support," we will presume that this motion was tried by consent and was disposed of in the trial court's January 5, 2000 order modifying his child support obligation.

The transcript of the October 27, 1999 hearing reflects that Dr. Chorost believed that the trial court would be re-examining his child support obligation from the August 12, 1998 order forward. This belief is mistaken as a matter of law because of the lateness of his Tenn. R. Civ. P. 59.04 motion. Tenn. Code Ann. § 36-5-101(a)(5) provides that trial courts may not modify child support obligations that have already accrued before the date of the filing of a motion to modify child support. Accordingly, because Dr. Chorost did not file his motion to modify his child support until January 22, 1999, his child support obligations accruing prior to January 22, 1999 were beyond the reach of judicial review. The trial court could only grant relief, if warranted, from and after January 22, 1999.

The trial court entered its order adjusting Dr. Chorost's child support obligation on January 5, 2000. Dr. Chorost filed his notice of appeal from this order on February 2, 2000. Accordingly, this court has the authority to review the portions of the trial court's January 5, 2000 order that involve his child support obligation from and after January 22, 1999. All issues involving child support accruing before January 22, 1999 have become final and cannot be reviewed at this stage of the proceeding.

III.
DR. CHOROST'S CHILD SUPPORT OBLIGATION

Dr. Chorost takes issue with the trial court's decision to calculate his child support based on its estimation of his potential income rather than his actual income. While the trial court did not explicitly find that Dr. Chorost was willfully and voluntarily underemployed, its orders leave no doubt that the trial court concluded that Dr. Chorost's income should have been higher than it

actually was. Based on our independent review of the record, we have determined that the evidence preponderates against the conclusion, explicit or implicit, that Dr. Chorost was willfully and voluntarily underemployed.

A.

An obligor parent may request a prospective modification of his or her child support at any time. To obtain a modification, the parent must prove (1) the amount of his or her current net income[7] and (2) the existence of a "significant variance" between his or her current child support obligation and the obligation that would be required by the Child Support Guidelines based on his or her current income.[8] For the purpose of child support, a "significant variance" is "at least 15% if the current support is one hundred dollars ($100.00) or greater per month and at least fifteen dollars ($15.00) if the current support is less than one hundred dollars ($100.00) per month." Tenn. Comp. R. & Regs. r. 1240-2-4-.02(3). Because the Child Support Guidelines calculate child support obligations based on the obligor parent's net income and the number of children to be supported, a significant variance may arise either from a change in the number of children entitled to support or by a change in the obligor parent's income.[9] Child support controversies most often involve disputes regarding the obligor parent's income.

Once an obligor parent makes out a prima facie case for modifying his or her child support, the burden shifts to the custodial parent to prove that the requested modification is not warranted by the guidelines. *See Eatherly v. Eatherly*, 2001 WL 468665, at *11 (holding that the burden of proof to establish willful and voluntary underemployment is on the custodial spouse). If the custodial parent fails to rebut the obligor parent's prima facie case, the court must modify the obligor parent's child support obligation. A custodial parent may rebut an obligor parent's prima facie case by proving: (1) that more children are entitled to support than claimed by the obligor parent, (2) that the obligor parent did not accurately report all of his or her income, (3) that the obligor parent is willfully and voluntarily unemployed or underemployed, (4) that the obligor parent owns valuable assets or resources that warrant deviating from the guidelines, or (5) any other circumstances delineated in Tenn. Comp. R. & Regs. r. 1240-2-4-.04 (1997) that warrant deviation from the guidelines. This case appears to be one in which the trial court decided that the obligor spouse is willfully and voluntarily underemployed.

Parents must support their minor children. Tenn. Code Ann. § 34-1-102(a), (b) (2001); *Smith v. Gore*, 728 S.W.2d 738, 750 (Tenn. 1987); *Witt v. Witt*, 929 S.W.2d 360, 362 (Tenn. Ct. App. 1996). The statutes and guidelines governing child support exist to advance the public policy that

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[7] Child support calculations are based upon "net income" as defined in Tenn. Comp. R. & Regs. r. 1240-2-4-.03(4) (1997). An obligor parent is in the best position to provide evidence regarding his or her income. *Kirchner v. Pritchett*, No. 01A01-9503-JV-00092, 1995 WL 714279, at *3 (Tenn. Ct. App. Dec. 6, 1995) (No Tenn. R. App. P. 11 application filed).

[8] The parent seeking the modification has the burden of proving the existence of a "significant variance." *Eatherly v. Eatherly*, No. M2000-00886-COA-R3-CV, 2001 WL 468665, at *3 (Tenn. Ct. App. May 4, 2001) (No Tenn. R. App. P. 11 application filed); *Turner v. Turner*, 919 S.W.2d 340, 345 (Tenn. Ct. App. 1995).

[9] Tenn. Comp. R. & Regs. r. 1240-2-4-.03(2), (5) (1997); *Turner v. Turner*, 919 S.W.2d at 344.

children of divorced parents are entitled to support that is reasonably consistent with the parents' financial resources. Tenn. Comp. R. & Regs. r. 1240-2-4-.02(2)(e); *Nash v. Mulle*, 846 S.W.2d 803, 808 (Tenn. 1993); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248-49 (Tenn. Ct. App. 2000). Their goal is to maintain, when possible, the standard of living the child would have had if his or her parents had not divorced. *Huntley v. Huntley*, 61 S.W.3d 329, 337 (Tenn. Ct. App. 2001). Children of divorced parents have the right to share in their parents' prosperity just as children of most married parents do. However, by the same token, children of divorced parents, like children of married parents, cannot always be shielded from the effects of their parents' financial misfortunes.

The courts understand that divorced parents are faced with the sometimes difficult challenge of putting their lives back together following a divorce and that these parents should be afforded the latitude to pursue their own happiness and to make reasonable employment decisions consistent with their personal interests. However, the courts will not permit divorced parents to ignore their child support obligations while they are putting their lives back together. *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001); *Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). The courts do not favor parents who purposely reduce their income to evade their obligation to support their children. *Anderson v. Anderson*, No. 01A01-9603-CV-00118, 1996 WL 465242, at *1 (Tenn. Ct. App. Aug. 16, 1996) (No Tenn. R. App. P. 11 application filed). Accordingly, parents will not be permitted to evade or reduce their child support obligation by liquidating their business, quitting their job, or taking a lower paying job. *Eatherly v. Eatherly*, 2001 WL 468665, at *8; *Wix v. Wix*, M2000-00230-COA-R3-CV, 2001 WL 219700, at *13 (Tenn. Ct. App. Mar. 7, 2001) (No Tenn. R. App. P. 11 application filed); 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.1, at 361-62 (2d ed. 1987).

The Child Support Guidelines address this sort of conduct by providing that

> [i]f an obligor [parent] is willfully and voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, as evidenced by educational level and/or previous work experience.

Tenn. Comp. R. & Regs. r. 1240-2-4-.03(3)(d). For the purposes of the guidelines, willful and voluntary unemployment or underemployment is not limited to occupational choices motivated by a desire to avoid paying child support. It can be based on any occupational choice reflecting an obligor parent's intent or desire to reduce his or her income. *Coates v. Coates*, No. M2001-01928-COA-R3-CV, 2002 WL 31528512, at *3 (Tenn. Ct. App. Nov. 15, 2002) (No Tenn. R. App. P. 11 application filed); *Wilson v. Wilson*, 43 S.W.3d 495, 497 (Tenn. Ct. App. 2000).

Determining whether a parent is willfully and voluntarily unemployed or underemployed is a fact-driven inquiry that requires careful consideration of all relevant circumstances. *State ex rel. Phillips v. Knox*, No. E2000-02988-COA-R3-JV, 2001 WL 1523347, at *4 (Tenn. Ct. App. Nov. 29, 2001) (No Tenn. R. App. P. 11 application filed); *Wix v. Wix*, 2001 WL 219700, at *12; *Ralston v. Ralston*, No. 01A01-9804-CV-00222, 1999 WL 562719, at *3 (Tenn. Ct. App. Aug. 3, 1999) (No Tenn. R. App. P. 11 application filed). The twofold purpose of the inquiry is to discover the reasons

for the obligor parent's occupational choices[10] and to assess the reasonableness of these choices, particularly in light of the parent's obligation to support his or her child or children.[11] In cases of this sort, the courts commonly consider the obligor spouse's (1) past and present employment or business activities,[12] (2) current employability,[13] (3) earning potential,[14] and (4) assets and other indicia of wealth.[15]

Other circumstances become relevant when the request for modification of child support follows a change in the obligor spouse's employment. The most common inquiry is whether the obligor parent's change in employment is voluntary or involuntary. The courts are inclined to find willful and voluntary unemployment or underemployment when a parent voluntarily leaves a job and accepts employment providing less income. *E.g. Brooks v. Brooks*, 992 S.W.2d at 407; *Morando v. McGahan*, No. M2000-01551-COA-R3-JV, 2002 WL 54307, at *4 (Tenn. Ct. App. Jan. 15, 2002) (No Tenn. R. App. P. 11 application filed); *Willis v. Willis*, 62 S.W.3d at 738. They are, however, less inclined to reach that conclusion when an obligor parent has little or no choice about taking a lower paying job. *Wilson v. Wilson*, 43 S.W.3d at 497. The inquiry does not end with a determination that the change in the obligor parent's employment was involuntary. The courts will also scrutinize the obligor parent's conduct after the change. Typically, the courts will examine (1) the obligor parent's efforts to make up lost income,[16] (2) the availability of employment for which

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[10] *E.g.*, *Scott v. Scott*, No. M1999-00322-COA-R3-CV, 2001 WL 266038, at *3 n.4 (Tenn. Ct. App. Mar. 20, 2001) (No Tenn. R. App. P. 11 application filed); *Creson v. Creson*, No. 02A01-9801-CH-00002, 1999 WL 65055, at *5 (Tenn. Ct. App. Feb. 12, 1999) (No Tenn. R. App. P. 11 application filed); *McGaffic v. McGaffic*, No. 03A01-9707-CV-00286, 1997 WL 772899, at *4 (Tenn. Ct. App. Dec. 9, 1997) (No Tenn. R. App. P. 11 application filed).

[11] *E.g.*, *Eatherly v. Eatherly*, 2001 WL 468665, at *11; *State ex rel. Ledbetter v. Godsey*, No. M1998-00958-COA-R3-CV, 2000 WL 798641, at *4 (Tenn. Ct. App. June 22, 2000) (No Tenn. R. App. P. 11 application filed); *Narus v. Narus*, No. 03A01-9804-CV-00126, 1998 WL 959839, at *2 (Tenn. Ct. App. Dec. 31, 1998) (No Tenn. R. App. P. 11 application filed).

[12] *E.g.*, *Eldridge v. Eldridge*, No. W2000-00730-COA-R3-CV, 2002 WL 1838145, at *16 (Tenn. Ct. App. Aug. 8, 2002), *perm. app. denied* (Tenn. Mar. 10, 2003); *Milam v. Milam*, No. M2001-00498-COA-R3-CV, 2002 WL 662026, at *3 (Tenn. Ct. App. Apr. 23, 2002) (No Tenn. R. App. P. 11 application filed); *Willis v. Willis*, 62 S.W.3d at 738.

[13] *E.g.*, *State ex rel. Davenport v. Partridge*, No. E1999-02779-COA-R3-CV, 2000 WL 1877492, at *3 (Tenn. Ct. App. Dec. 27, 2000) (No Tenn. R. App. P. 11 application filed); *Ralston v. Ralston*, 1999 WL 562719, at *7.

[14] *E.g.*, *Brooks v. Brooks*, 992 S.W.2d 403, 407 (Tenn. 1999); *Ekelem v. Ekelem*, No. W2001-02986-COA-R3-CV, 2003 WL 21014972, at *5 (Tenn. Ct. App. Apr. 16, 2003); *Willis v. Willis*, 62 S.W.3d at 738; *Watters v. Watters*, 22 S.W.3d 817, 823 (Tenn. Ct. App. 1999).

[15] *E.g.*, *Ekelem v. Ekelem*, 2003 WL 21014972, at *5.

[16] *E.g.*, *Eldridge v. Eldridge*, 2002 WL 1838145, at *16-17; *Morando v. McGahan*, 2002 WL 54307, at *4; *Seaton v. Reynolds*, No. 02A01-9810-JV-00290, 1999 WL 20790, at *2 (Tenn. Ct. App. Jan. 20, 1999) (No Tenn. R. App. P. 11 application filed).

the obligor parent is qualified,[17] and (3) the obligor parent's efforts to find comparable employment.[18]

B.

Whether an obligor parent is willfully and voluntarily unemployed or underemployed for the purpose of Tenn. Comp. R. & Regs. r. 1240-2-4-.03(3)(d) is a question of fact.[19] The finding must be supported by evidence in the record,[20] and it is far better practice to make explicit findings that an obligor parent is willfully and voluntarily unemployed or underemployed before basing a parent's child support on his or her "potential income," rather than his or her actual income.[21] However, even in the absence of an explicit finding of willful and voluntary unemployment, the reviewing courts will give effect to the implicit findings when they can be gleaned from the trial court's ruling.[22] A decision to base an obligor parent's child support obligation on the parent's potential income necessarily implies a finding of willful and voluntary employment or underemployment.[23]

Because willful and voluntary unemployment or underemployment is a question of fact, we review the trial court's conclusions using the standard of review in Tenn. R. App. P. 13(d). *Brooks v. Brooks*, 992 S.W.2d at 405; *Mitts v. Mitts*, 39 S.W.3d 142, 148 (Tenn. Ct. App. 2000). Consequently, this court accords great weight to the trial court's determinations of credibility and routinely declines to second-guess those determinations unless there is clear and convincing evidence to the contrary. *Scott v. Scott*, 2001 WL 266038, at *4; *Lightfoot v. Lightfoot*, No. E2001-00106-COA-R3-CV, 2001 WL 1173297, at *6 (Tenn. Ct. App. Oct. 4, 2001) (No Tenn. R. App. P. 11 application filed). If the trial court has not made an explicit, threshold finding that the obligor parent is willfully and voluntarily unemployed or underemployed, we must conduct our own independent view of the record, and we must also decline to give the trial court's findings their customary

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[17] *E.g., Brooks v. Brooks*, 992 S.W.2d at 409 (Birch, J., dissenting); *State ex rel. Ledbetter v. Godsey*, 2000 WL 798641, at *5; *Narus v. Narus*, 1998 WL 959839, at *2.

[18] *E.g., State ex rel. Hartley v. Robinson*, No. M2000-01625-COA-R3-CV, 2001 WL 487558, at *3 (Tenn. Ct. App. May 9, 2001) (No Tenn. R. App. P. 11 application filed); *State ex rel. Ledbetter v. Godsey*, 2000 WL 798641, at *5; *Ralston v. Ralston*, 1999 WL 562719, at *4.

[19] *Eldridge v. Eldridge*, 2002 WL 1838145, at *16; *Morando v. McGahan*, 2002 WL 54307, at *3; *Willis v. Willis*, 62 S.W.3d at 738.

[20] *Eatherly v. Eatherly*, 2001 WL 468665, at *11; *Ralston v. Ralston*, 1999 WL 562719, at *9; *Anderton v. Amari*, No. M1999-01145-COA-R3-CV, 2000 WL 827947, at *6 (Tenn. Ct. App. June 27, 2000) (No Tenn. R. App. P. 11 application filed).

[21] *Anness v. Chapdelaine*, No. M2000-01792-COA-R3-CV, 2001 WL 1077959, at *3 (Tenn. Ct. App. Sept. 14, 2001) (No Tenn. R. App. P. 11 application filed); *Herrera v. Herrera*, 944 S.W.2d 379, 387 (Tenn. Ct. App. 1996).

[22] *Brooks v. Brooks*, 992 S.W.2d at 406; *Annes v. Chapdelaine*, 2001 WL 277993, at *3; *Pennington v. Pennington*, No. W2000-00568-COA-R3-CV, 2001 WL 277993, at *3 (Tenn. Ct. App. Mar. 14, 2001 (No Tenn. R. App. P. 11 application filed).

[23] *Hyden v. Hyden*, No. 02A01-9611-CH-00273, 1997 WL 593800, at *3 (Tenn. Ct. App. Sept. 25. 1997) (No Tenn. R. App. P. 11 application filed).

presumption of correctness. *Brooks v. Brooks*, 992 S.W.2d at 405; *Pennington v. Pennington*, 2001 WL 277993, at *3.

Like the question of willful and voluntary unemployment or underemployment, the obligor parent's potential income is a question of fact. *Morando v. McGahan*, 2002 WL 54307, at *4 n.2; *Willis v. Willis*, 62 S.W.3d 739; *Renick v. Renick*, No. 01A01-9007-CV-00263, 1991 WL 99514, at *6 (Tenn. Ct. App. June 21, 1991); *perm. app. denied* (Tenn. Nov. 4, 1991). The determination of potential income must be supported by evidence in the record. *Eatherly v. Eatherly*, 2001 WL 468665, at *11; *Allen v. Allen*, No. M1999-00748-COA-R3-CV, 2000 WL 1483389, at *6 (Tenn. Ct. App. Oct. 10, 2000) (No Tenn. R. App. P. 11 application filed). In cases where an obligor parent has voluntarily changed employment, the courts may base the parent's potential income on his or her previous income because the previous income would have continued had it not been for the obligor spouse's decision to change employment. *Brooks v. Brooks*, 992 S.W.2d at 407; *Watters v. Watters*, 22 S.W.3d at 823. However, there are circumstances in which imputing previous income to an obligor parent may not be appropriate. *Morando v. McGahan*, 2002 WL 54307, at *4 n.2; *Eatherly v. Eatherly*, 2001 WL 468665, at *11 n.10.

C.

The parties did not dispute that Dr. Chorost was forced to close his practice in Middle Tennessee because of the changes in TennCare's reimbursement for his low income patients. During the August 12, 1998 and October 27, 1999 hearings, he testified at some length regarding his efforts to reestablish his practice. He explained that he had hired a placement specialist and had pursued employment with the State of Tennessee and the Veterans Administration but had been unsuccessful because of governmental hiring freezes. He also described how he had continued to discuss professional affiliations with other physicians and hospitals in Middle and East Tennessee. He also testified that when full-time opportunities did not immediately present themselves, he decided that working as an independent contractor was the only realistic option while he continued to look for full-time employment.

In September 1997, he obtained a position for three months working for Horizon Mental Health in Knoxville. Following that work, he worked part-time for approximately three months with a mental health group in Middle Tennessee. He worked approximately twenty-four hours per week and received $1,920 per week for these services. When that work ended, Dr. Chorost earned no income other than a $2,500 expert witness fee, until October 1998 when he found another part-time position with Paradigm Health Services, Inc. in Chattanooga providing psychiatric services to approximately thirty nursing homes in southeast Tennessee. Dr. Chorost worked on average twenty to twenty-four hours per week and was paid $1,350 per week. When he left Paradigm Health Services in August 1999, Dr. Chorost contracted with Fortwood Center, Inc., a community mental health center in Chattanooga, to provide 10.5 hours of services per week. He was paid $1,050 per week for these services.

Ms. Chorost put on no evidence to rebut Dr. Chorost's testimony regarding his actual income after January 1997, his current employability, the availability of full-time employment as a psychiatrist in Tennessee, or his efforts to find full-time employment. She did not assert that he was less than forthcoming about his income. Nor did she assert that he was willfully and voluntarily

underemployed or that his efforts to find employment were unreasonable. Similarly, the trial court did not explicitly find that Dr. Chorost was willfully and voluntarily underemployed or that his testimony regarding his actual income and his efforts to reestablish his practice was untruthful.

Nonetheless, the trial court disregarded Dr. Chorost's actual income from January 1997 through 1999 and calculated his child support obligation on its assumption, wholly unsupported by the evidence, that Dr. Chorost could find as much work as he wanted because he was a psychiatrist. In its April 8, 1998 order setting temporary child support, the trial court noted that Dr. Chorost was "only working twenty-three or twenty-four hours per week" but then observed that "he is a psychiatrist and there is no reason that he cannot supplement his income."

Similarly, in its final order of October 14, 1998, the trial court noted that Dr. Chorost had closed his practice but held him "accountable" for his financial reversals.[24] The court also stated:

> The Court does not believe that it would be just to the children to set child support based upon minimum wage, when their father is a doctor and psychiatrist that can earn Eighty ($80.00) Dollars per hour, part time. He does not even have a part time job today.[25] Therefore, the Court must fall back on his previous income. In 1995, according to his tax returns, he earned One Hundred and Four Thousand ($104,000.00) Dollars. In 1994, according to his own tax return, he earned Ninety-five Thousand ($95,000.00) Dollars. If he had a full-time job at eighty ($80.00) Dollars an hour, his income would be One Hundred and Sixty-Six Thousand and Four Hundred ($166,400.00) Dollars per year. However, if the Court uses the figure that he can earn One Hundred Thousand ($100,000.00) Dollars per year, his child support should be Five Hundred and Fifty-four and 18/100 ($554.18) Dollars per week.

Based on its conclusion that Dr. Chorost was capable of earning $100,000 per year, the trial court set his permanent child support at $581.89[26] per week for three children and stated that this amount would be reduced to $387.93[27] per week when one of the three children reached the age of majority.

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[24] The trial court stated:

> At any rate, the parties have been separated since September, 1996, and now the Defendant is no longer in business. He has no clear plan for how he is going to proceed from here professionally. The Court does not find any evidence which attributes his current professional condition to the Wife. This is a situation that he will be held accountable.

[25] This order is a transcription of the trial court's ruling from the bench at the close of the August 12, 1998 hearing. It did not necessarily reflect Dr. Chorost's circumstances when the final order was entered. Two days after the entry of the final order, Dr. Chorost contracted with Paradigm Health Services to work twenty to twenty-four hours per week for $1,350 per week.

[26] $554.18 + $27.71 [5% clerk's fee] = $581.89.

[27] $369.46 + $18.47 [5% clerk's fee] = $387.93.

In its final order entered on January 5, 2000, after reconsidering the child support required in its October 14, 1998 order, the trial court made the following findings, among others:

(1) Dr. Chorost "is a licensed psychiatrist according to the privileges of the State of Tennessee, and there is no evidence which suggests that the Defendant [Dr. Chorost] cannot provide his services to anyone who might need or want them."

(2) "Without being employed by any other entity, the Defendant is in the position to hire himself out for as many hours as he deems appropriate, and from this he can earn a living."

(3) "The Court does not believe that it is fair to the Plaintiff [Ms. Chorost], when she has the burden of providing for the children more than the guidelines presume, that the Court should establish the Defendant's child support on a ten and one-half (10½) hour work week. Most people who are not professionals work a forty (40) hour work week, and that is a minimum. At the least, the Defendant should be able to work a twenty (20) hour work week at Eighty (80) Dollars per hour rather than One Hundred ($100.00) Dollars per hour. That amounts to One Thousand Six Hundred Dollars per week that he could earn. Based on support for two (2) children, the Defendant should pay support in the amount of Four Hundred Eighteen ($418.00) Dollars per week, and he should be able to do this even considering what he has been through in having to make adjustments resulting from his divorce."

(4) "This Order is not requiring the Defendant to work Forty (40) hours per week, which every other employee works that is not a professional in the State of Tennessee. The Court is calculating his child support on what might be considered part-time employment for a person who is otherwise physically able and suffers no disability of which the Court is aware that may prevent him from working as a licensed physician with a Psychiatry degree. And where every other non-professional in this State works Forty (40) hours, here we have a professional being held to a standard requiring that he only be expected to work Twenty (20) hours at Eighty ($80.00) Dollars per hour, even where he currently makes One Hundred ($100.00) Dollars per week."

D.

We have independently examined the evidence without according the trial court's findings a presumption of correctness because the trial court did not explicitly find that Dr. Chorost was willfully and voluntarily underemployed. Based on this examination, we have reached three conclusions. First, there is a "significant variance" between Dr. Chorost's presumed income in the

October 14, 1998 order and his actual income for the first seven months of 1999.[28] Second, the evidence does not support the trial court's conclusion that Dr. Chorost could have found more work as a psychiatrist in Tennessee than he actually found between January 1997 and January 2000. Third, the evidence does not support the trial court's conclusion that Dr. Chorost should have been earning a gross income of $83,200 per year[29] in 1999 rather than what he was actually earning.

Based on these conclusions, we have determined that the trial court erred in its January 5, 2000 order when it calculated Dr. Chorost's child support based on his potential income rather than his actual income. Accordingly, we vacate the portions of the trial court's January 5, 2000 order regarding Dr. Chorost's child support obligation from and after January 22, 1999, and remand the case to the trial court with directions to calculate Dr. Chorost's child support based on his actual net income unless Ms. Chorost presents evidence warranting departure from the guidelines. This decision does not affect Dr. Chorost's child support obligations that accrued prior to January 22, 1999 – the date that he filed his motion to modify child support. These obligations are beyond our reach on this appeal for the reasons discussed in Section II of this opinion.

IV.
THE AWARD FOR ATTORNEY'S FEES

As a final matter, Dr. Chorost takes issue with the trial court's decision to require him to pay $1,000 of the legal expenses Ms. Chorost incurred defending his January 22, 1999 motion to modify his child support obligation. He argues that attorney's fees are a form of spousal support and that Ms. Chorost does not require additional spousal support in light of her income. While we find this argument somewhat misdirected, we have concluded that the trial court erred by ordering Dr. Chorost to pay $1,000 of Ms. Chorost's attorney's fees.

Persons who are required to return to court to enforce their former spouse's child support obligations may recover their legal expenses. Tenn. Code Ann. § 36-5-103(c) (Supp. 2002). The purpose of permitting these awards is to protect and promote a child's right to support. Accordingly, requiring parents who frustrate child support orders to underwrite the expense of vindicating a child support order is appropriate. *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992).

While decisions regarding requests for legal expenses are discretionary, *Placencia v. Placencia*, 3 S.W.3d 497, 504 (Tenn. Ct. App. 1999), awards for expenses incurred by a spouse to vindicate child support rights are becoming familiar and almost commonplace. *Deas v. Deas*, 774

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[28] Dr. Chorost's child support obligation in the October 14, 1998 order was based on the trial court's conclusion that he was capable of earning $8,333 per month. His average actual income for the first seven months of 1999 (based on his deposits) was $6,953 per month. According to the guidelines, Dr. Chorost's child support obligation for two children based on gross earnings of $8,333 per month would have been approximately $1,859 per month. Had his child support been calculated using his actual income, it would have been $1,556 per month. The difference between these two amounts – 16.3% – is "substantial" for the purpose of Tenn. Comp. R. & Regs. r. 1240-2-4-.03 because it exceeds 15%.

[29] The trial court premised the child support award in its October 14, 1999 order on its assumption that Dr. Chorost should be earning $1,600 per week [20 hours × $80 per hour = $1,600 per week]. This weekly salary would translate to an $83,200 annual salary [$1,600 per week × 52 weeks = $83,200 per year].

S.W.2d 167, 170 (Tenn. 1989); *Sherrod v. Wix*, 849 S.W.2d at 785. These awards are appropriate when the parent seeking to defend or to enforce a child support obligation prevails or when requiring the prevailing spouse to pay his or her legal expenses would inequitably reduce the amount of support the child receives. *Richardson v. Richardson*, 969 S.W.2d 931, 936 (Tenn. Ct. App. 1997). A spouse who is otherwise entitled to an award for legal expenses should not be prevented from collecting them simply because he or she might be financially able to pay these fees on their own. *Gaddy v. Gaddy*, 861 S.W.2d 236, 241 (Tenn. Ct. App. 1992).

Ms. Chorost did not return to court to enforce her children's right to support from Dr. Chorost. Rather, it was Dr. Chorost who filed the motion to modify support to reflect more accurately his actual financial circumstances. Dr. Chorost has prevailed in this endeavor, and accordingly, we perceive no factual or legal basis for requiring him to defray part of Ms. Chorost's legal expenses. Accordingly, we vacate the portion of the January 5, 2000 order directing Dr. Chorost to pay Ms. Chorost $1,000 for her legal expenses.

V.

We vacate the portions of the January 5, 2000 order calculating Dr. Chorost's child support obligations from and after January 22, 1999, and directing him to pay $1,000 of Ms. Chorost's legal expenses and remand the case to the trial court for further proceedings consistent with this opinion. Should it be determined that Dr. Chorost's child support payments made after January 22, 1999 exceed his obligation, the over-payments should be applied toward any arrearage accrued before January 22, 1999. We tax the costs of this appeal in equal proportions to David Ian Chorost and his surety and Gina M. Chorost, for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUDGE